Clause (a)* which covers damaging or tampering with anything is the broadest and is limited to "circumstances when such acts are likely to or do seriously impair United States military effectiveness." The generality of the property covered, "damages or tampers with *anything*," recognizes a degree of futility in attempting to list, or narrow the scope of, the protected property. This provision will also cover tampering with things related to Atomic Energy information under 42 U.S.C. § 2276 (tampering with restricted data) and with national defense information for which there is no specific provision in current law. Note that the draft refers to damaging or tampering while 42 U.S.C. § 2276 covers "remov[ing], conceal[ing], tamper[ing] with, alter[ing], mutilat[ing] or destroy[ing]." "Tampers" or "damages" in the draft, together with the espionage provisions (draft sections 1113–1116), are intended to cover all the conduct described in 42 U.S.C. § 2276.

The limitation concerning serious impairment of military effectiveness ("is likely to or does" occur), avoids covering as a Class A or B felony conduct with only a potentially minor effect on military effectiveness, such as breaking a window in a warehouse as an expression of opposition. Such conduct, of course, is punishable as criminal mischief, but not as sabotage except in the improbable event it occurs in circumstances under which military effectiveness will be thereby seriously impaired. This approach avoids the kind of problem which can arise where essentially innocuous conduct and minor harm are combined with an intent which is proscribed, but which may be more a manifestation of pique than of subversion. The sort of damage comprehended by "serious impairment" obviously involves some borderline situations. While this fact alone is insufficient to bar constitutionality, since the conduct itself is prohibited and should not be engaged in any event,[9] the Commission may wish to consider the possibility of statutorily identifying factors involved in the notion of serious impairment, such as increased costs, delayed production, risk to lives, the need to alter or abandon a previous plan.

Clauses (b) and (c)** involve defective manufacture or repair and improperly operating or failing to operate[10] something of "direct

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**See* note **, p. 441, *supra*.

** This was excluded from the final version of the Study Draft.

[9] *See, e.g., Palakiko* v. *Harper*, 209 F.2d 75, 101–102 (9th Cir. 1953), upholding a statute making killing committed with "extreme atrocity or cruelty" first degree murder. *See also Boyce Motor Lines* v. *United States*, 342 U.S. 337, 340 (1952), in which the Court stated:

> Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

In this connection, *see Etherton* v. *United States*, 249 F.2d 410 (9th Cir. 1957), which upheld a statute creating a felony offense for contributing to the delinquency of a minor but provided alternative penalties. In addition, the culpability requirement of section 1106(1) ("intent to impair") sufficiently advises the defendant as to what he may not do. *See Gorin* v. *United States*, 312 U.S. 19, 26–27 (1941), sustaining against a charge of vagueness the espionage provision of Title 18 which proscribes conduct in relation to "national defense information" by relying on the culpability element of intent to injure the United States.

The term "seriously" was also relied on in an earlier version of Study Draft section 1306. *See* note **, p. 441 *supra*.

[10] The labor dispute situation under sections 1106(1) and 1108 (*see* note 5, *supra*) is excluded by limiting culpability to "intent" rather than "reason to believe." *See* the discussion of culpability, *infra*. Consideration should be given to expressly excluding labor stoppages or "*lawful* labor stoppages" from section 1107.

The proposal follows Justice Brandeis' dissent in the *Pierce* case to the effect that the statement must be something "capable of being proved false in fact." (252 U.S. at 255)

ESPIONAGE AND RELATED OFFENSES: SECTIONS 1113–1117

1. *Current Law; General Organization of Draft Proposals.*—The central provisions in current law covering the protection of information related to the national security are:

(a) Title 18, chapter 37 (espionage and censorship);
(b) 50 U.S.C. §§ 783 (b), (c) and (d), which deal with public servants communicating classified information to foreign governments and "communist organizations" and the receipt of such information by the proscribed persons; and
(c) Title 42, which deals with restricted data under the Atomic Energy Act (particularly 42 U.S.C. §§ 2274–2277).

Proposed sections 1113–1117 would substitute for the current overcomplicated provisions of current law, a simplified and rationally organized group of offenses covering five major categories of concern in the area of information related to the national security.

(a) Section 1113 deals with espionage, the communication, with hostile intent (as defined in the draft), to a foreign government of information which should be quarantined—this is the base offense.
(b) Section 1114 deals with the situations which present the risk that information relating to national security will fall into unauthorized hands whether or not the actor so intended.
(c) Section 1115 is directed to the special problems which arise because information is classified by the government as affecting the national security.
(d) Section 1116 is addressed to special categories of persons—foreign agents and members of certain communist organizations who obtain classified information, or seek to induce others to communicate classified information.
(e) Wartime censorship of communications is covered by Section 1117.

2. *Definition of Espionage and National Defense Information; Proposed Sections 1113(1) and (4).*—Subsection (1) of draft section 1113 defines espionage as intentionally revealing national defense information to a foreign power with intent to injure the United States or to benefit a foreign power in an actual or possible military or diplomatic confrontation with the United States. The key concepts in the proposed offense are "national defense information," the act of *revealing* such information to a foreign power and the culpability.

Subsection (4)(a) defines "national defense information." One of the main deficiencies of present law arises from lack of certainty as to the kind of information to which the prohibition of communication refers. The current basic espionage statute outlaws the communication to a foreign agent of "information relating to the national defense" (18 U.S.C. § 794(a)).[1] The primary subject of concern in prosecutions

[1] 18 U.S.C. § 794(b) outlaws wartime communication to "an enemy" of specified information "or any other information relating to the public defense, which might be useful to the enemy."

under this statute involves the undefined phrase "information relating to the national defense." The fact that information is classified is not conclusive on whether it is "national defense information",[2] and if it is not classified, it could still be "national defense information". The issue is submitted to the jury under judicially devised standards. *Gorin* v. *United States*, 312 U.S. 19 (1941), and *United States* v. *Heine*, 151 F. 2d 813 (2d Cir. 1945), demonstrate the difficulties the courts have had in devising a definition. Relevant excerpts from these opinions are set forth in the Appendix, *infra*.

In *Gorin* the Supreme Court accepted the government's definition of information relating to the national defense:

> . . . a generic concept of broad connotations, referring to the military and naval establishments and the related activities of national preparedness. (312 U.S. at 28.)

In its first three categories the draft definition of "national defense information" (proposed section 1113 (4)(a)(i)–(iii)), incorporates the ideas of the *Gorin* definition and 18 U.S.C. § 793(a) (gathering information) and § 794(a), to cover information regarding:

> (i) the military capability of the United States or of a nation at war with a nation with which the United States is at war;
> (ii) military or defense planning or operations;
> (iii) military communications, intelligence, research, or development;

In addition to these three categories, the definition also includes:

> (iv) restricted data under the Atomic Energy Act;
> (v) military or diplomatic codes;
> (vi) any other information which could be diplomatically or militarily useful to an enemy.

The references in clauses (iv), (v), and (vi) serve to incorporate the provisions of 42 U.S.C. § 2274(a) and 18 U.S.C. §§ 798 (classified codes) and 952 (diplomatic codes) into the general espionage section and eliminate the need for special provisions on these subjects.[3]

It should be noted that neither 18 U.S.C. § 798 nor 18 U.S.C. § 952[4] now require an intent to injure the United States and section 798 is limited to "classified" information concerning codes. Insofar as communication without intent is concerned, much of this conduct will be covered by proposed section 1114 (mishandling sensitive information relating to national security) as reckless conduct. The effect of the proposal on the "classified" facet of military codes[5] under 18 U.S.C. § 798, is to make no change in current law. This conclusion is warranted by the

[2] *United States* v. *Rosenberg*, 108 F. Supp. 798, 808 (S.D.N.Y. 1953). *See* note 24, *infra*, and accompanying text.

[3] Continued coverage of public servants under 18 U.S.C. § 952, where there is no harm to national security, could be accomplished by disciplinary means or a regulatory offense located in Title 22. *See* note 4, *infra*.

[4] Note that 18 U.S.C. § 952 is essentially a foreign relations provision, limited to revelation by public servants and former public servants of codes and intercepted diplomatic messages. The current provision was the subject of much controversy when enacted and, as in the proposal, is not limited to public servants, but revelation must have some relationship to national security which includes actual or potential diplomatic confrontations.

[5] The complicated definitions of codes in 18 U.S.C. § 798 and the explicit references to information derived from decoding in 18 U.S.C. § 952 are not included in the proposal. The references to "codes" and the general clause, section 1113 (4)(vi), "any other information which could be diplomatically or militarily useful to an enemy," are deemed sufficient for this purpose.

following discussion of the term "reveals" in section 1113 and the current requirement that the classification "in fact" be in the interest of national security.[6]

The use of the term "reveals" in lieu of a term like "communicates" is intended to meet the point in *Gorin*[7] and *Heine*[8] which exclude information which has been previously revealed to the public or which may be disclosed for domestic consumption, from the coverage of the espionage statutes (18 U.S.C. § 794). *Heine* makes it clear that the gist of espionage is that it covers only such information which can aid an enemy as would not be available to the enemy except for the conduct of a person avoiding a restriction on communication or *revelation* to the public. The *Heine* approach to the problem makes it unclear if the holding is that such information is not "national defense information" or if the court is reading into the section a defense that it is in the public domain. The latter explanation is more in accord with the court's language, but results in the court adding a defense rather than construing statutory phraseology. The term "reveals" is intended to convey this idea by dealing with the defendant's act, *i.e.*, revealing, with respect to the information defined.[9]

Consideration was given to relying on a "public domain" defense rather than the term "reveals," but this resulted in overcomplicated drafting. In particular, it would have led to difficulties with the conduct now covered in 18 U.S.C. § 794(b) which covers information communicated to an enemy about which there may be domestic public knowledge, but which should not be known by an enemy. Thus, although aspects of large-scale military activity, such as the D–Day invasion, may be known to the public because of the necessarily public nature of the activities, revelation of this information to an enemy is a serious form of espionage.[10] Reliance on "reveals" in lieu of formulating a defense avoids the need for detailed exceptions and careful charting where the more general term serves the ultimate purpose. The effect of classification under current law is considered at length in paragraph 6, *infra*. For purposes of proposed section 1113, it is sufficient to note that information need not be classified to constitute "national defense information" and the fact it is classified does not preclude the defendant from challenging the propriety of classification. This is in accord with current law under 18 U.S.C. § 794.[11]

The general inclusion of "any other information which could be diplomatically or militarily useful to an enemy," reflects the teaching of *Gorin*. Although a general clause of this kind could undercut the attempt at more precise definition, the culpability required under section 1113 together with the requirement of "revealing" sufficiently protects innocent conduct.

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[6] *See* paragraph 6, and note 24, *infra*.
[7] *Gorin* v. *United States*, 312 U.S. 19 (1941).
[8] *United States* v. *Heine*, 151 F.2d 813 (2d Cir. 1945).
[9] Note that this leaves open the possibility that "facilitating [the] use [of information] by condensing and arranging it," conduct excluded under *Heine*, Appendix *infra*, could under appropriate facts constitute "revealing" under proposed section 1113.
[10] For an early version of 18 U.S.C. § 794(b) which provided that the "jury trying the cause shall determine . . . whether such information was of such character as to be useful to the enemy," *see* the Bill set forth in H. Rep. No. 65, 65th Cong., 1st Sess. (1917). (The Bill also provided for presidential designation of proscribed information.)
[11] *See* note 2, *supra*.

The culpability required for espionage by current law (18 U.S.C. § 794(a)) is communication of national defense information "with intent or reason to believe it is to be used to the injury of the United States or to the advantage of a foreign nation." The culpability requirement of the draft is defined as an "intent to injure the United States or to benefit a foreign power in the event of military or diplomatic confrontation with the United States." Coverage of both diplomatic and military confrontations extends to an avowed purpose to even up the sides. This intent is consistent with the nature of the information sought to be protected by the espionage offense.[12]

The term "reason to believe" in current espionage provisions has not been construed in any case in which an intent to benefit or injure was lacking. If it means recklessness, the current language could subject a defendant to the death penalty under 18 U.S.C. § 794(a) for reckless conduct. It is likely that such a construction neither was contemplated nor would be judicially decreed, but with the more precise definitions of culpability in the proposed new Code, there is no need to retain language which probably was intended only to reflect the kind of evidence from which a jury could find intent to benefit or injure.[13] Draft section 1114 covers some forms of reckless conduct. (*See* paragraph 5, *infra.*)

3. *Grading of Espionage; Proposed Section 1113.*—Present 18 U.S.C. § 794(a) authorizes the highest penalty (death) for both war and peacetime espionage. The failure of existing law to make any distinctions between war or peace on the subject of the espionage may be explained by the variety of provisions with lesser maxima under which the same conduct could be punished.[14] The proposal grades espionage as a Class A felony if committed during time of war or if it involves codes, sudden-strike or nuclear weaponry. This is similar to the grading in proposed section 1106 (sabotage).[15]

4. *Attempt and Conspiracy to Commit Espionage; Proposed Section 1113(3).*—Proposed section 1113(3) follows current law (18 U.S.C. § (a)) in grading attempt and conspiracy to communicate national defense information to a foreign government equally with the completed offense.

On the substantive issues of attempt, the draft improves current law in two respects: (a) it specifies certain conduct that will constitute attempt without regard to whether it would meet the substantial step test under the general attempt provision (proposed section 1001), and (b) it eliminates the need for complicated and antiquated provisions such as 18 U.S.C. § 793(a), (b) and (c).

Under the proposal, "obtaining, collecting, eliciting, or publishing information directly related to the military establishment or enter-

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[12] Any possible differences between the general espionage provision, 18 U.S.C. § 794(a), and the special wartime communication to an enemy under 18 U.S.C. § 794(b) will be covered by the draft because communication to an enemy of the proscribed information, by definition, will injure the United States or benefit a foreign nation in a confrontation.

[13] Note that 42 U.S.C. § 2274 distinguishes in grading between an intent to injure and reason to believe, when atomic secrets are involved.

[14] *See, e.g.*, 18 U.S.C. § 793 (gathering information—10 years); 18 U.S.C. § 798 (classified codes—10 years); 50 U.S.C. § 783(b) (communication of classified information by public servant—10 years).

[15] *See* the comment on sabotage (sections 1106-1108), *supra.*

ing a restricted area to obtain such information" (with the required intent) would constitute attempted espionage. Current law treats "gathering" national defense information with the proscribed intent separately from communicating such information.[16] 18 U.S.C. § 794(a) prohibits both communication and attempted communication and authorizes the death penalty for both, while gathering is subject only to a 10-year penalty. The source of the distinction in current law is not certain and there is no reason to perpetuate it.[17]

5. *Mishandling Sensitive Information Relating to National Security: Section 1114.*—Proposed section 1114 would replace 18 U.S.C. § 793(d)–(f), and, in some aspects, 18 U.S.C. § 793(c), with simplified descriptions of conduct involving mishandling national security information, when done in reckless disregard of potential injury to the national security of the United States. The conduct involves: (a) revealing national defense information to unauthorized persons; (b) violating a duty as a public servant with respect to custody or reporting loss of information;[18] and (c) failing to surrender a national security document or other thing on demand.

Current law[19] authorizes a 10-year penalty for such conduct, equal to the penalty for gathering with a hostile intent. The proposal, in grading the offense as a Class C felony, improves Federal law by taking into account the less serious culpability involved, and is consistent with the more recent grading policy reflected in the Atomic Energy Act, which does recognize differences between a subversive "intent" and recklessness.[20]

If it is deemed necessary to perpetuate criminal sanctions for negligent public servants or those who fail to report losses or theft without culpability concerning actual risk to national security, it is recommended that these be dealt with in Title 50 as regulatory offenses (proposed section 1006).

6. *Mishandling Classified Information; Proposed Section 1115.*—Section 1115 brings the provisions of 50 U.S.C. § 783(b) into Title 18 as a Class C felony.[21] It prohibits intentional communication of classified national security information to a foreign government or communist organization[22] by a public servant.

The major issues raised by this section are whether it should be expanded in one or both of the following respects:

(a) should it cover communication by any person or be limited to public servants?

(b) should it cover communication to any unauthorized person or be limited to foreign governments and communist organizations?

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[16] 18 U.S.C. § 793(a) and (b); 19 U.S.C. § 794(a).

[17] *Cf.* the Official Secrets Act of 1911, 1 & 2 Geo. 5, c. 28, §§ 1, 2, which contains similar distinctions.

[18] The reporting requirement is presently imposed under 18 U.S.C. § 793(f). A self incrimination question similar to that involved in *United States* v. *King*, 402 F. 2d 694 (9th Cir. 1968), might be applicable both to present law and the draft. The court in *King* held that the fifth amendment precludes conviction for willfully concealing information relating to a bank robbery by failing to report its commission to the authorities, where the defendant had reason to believe he would be implicated in the robbery committed by others.

[19] 18 U.S.C. § 793.

[20] *Compare* 42 U.S.C. § 2274(a) *with* 42 U.S.C. §§ 2274(b) and 2277.

[21] Current law authorizes a $10,000 fine or 10 years' imprisonment or both.

[22] Defined in 50 U.S.C. § 782(5).

Expanding coverage would practically eliminate the present distinction between "national defense information," which all persons are forbidden to communicate under the espionage statute (18 U.S.C. § 794), and "classified information" under 50 U.S.C. § 783, which only public servants are forbidden to communicate to a foreign agent or communist organization. Nonpublic servants communicating classified information must presently be prosecuted for offenses under 18 U.S.C. §§ 793 and 794(a)—offenses relating to "national defense information".[23] In a prosecution under one of the latter provisions the government must prove and the jury must find that the information communicated was "national defense information." Proof that the information was classified does not suffice (though if it was *properly* classified it would amount to national defense information).[24]

Problems of improper classification as such do not arise. But in a prosecution of a public servant for communicating classified information in violation of 50 U.S.C. § 783, the government need only prove the fact of classification. The obvious problems presented in this situation are compounded by the holding of *United States* v. *Scarbeck*, 317 F.2d 546 (D.C. Cir. 1962), which denied the defendant the defense that the information was improperly classified. While denial of the defense can thus have the harmful consequence of felony conviction for transmitting harmless information, as well as posing some threat to first amendment interests and to some extent undermining the policy against undue government secrecy, permitting the defense could, by necessitating exposure of the basis for classification, defeat the purpose of classifying information. Current law provides a practical approach to the problem. The fact that it is limited to communications to designated recipients substantially eliminates first amendment and undue government secrecy worries; those interests are not served by permitting revelation of classified information to a foreign government or "communist organization"—such recipients of classified information can hardly be said to have "standing" to raise the issue of a "right to know." The fact that such revelations are characteristically surreptitious underlines the point.

On the other hand, if the category of prohibited communicants and recipients is not limited as under present law, but expanded to include communication by anyone to any unauthorized person, it would be necessary to provide a defense of improper classification in order to avoid the danger of using classification and the threat of criminal sanctions to conceal government policy from those who have a right to know.[25] Such an expansion of the offense concerning communication

[23] *See* S. Rep. 111, 81st Cong., 2d Sess., on 18 U.S.C. § 798, quoted at length in note 26, *infra*, which in 1951, indicated a reluctance to expand the scope of the criminal law dealing with classified information.

[24] *See United States* v. *Rosenberg*, 108 F. Supp. 798, 808 (S.D. N.Y. 1952), a prosecution under 18 U.S.C. § 794 for communication of national defense information in which the court recognized the defendant's right to show that the classification of the information was arbitrary.

[25] The following provision was considered:

§ 1114. Mishandling Classified Information.

A person is guilty of a Class A misdemeanor if he knowingly violates a regulation with respect to disclosure of information the dissemination of which has been restricted by an appropriate governmental authority for reasons of national security. It is an affirmative defense to a prose-

of classified information, even with a defense of improper classification, is subject to two serious objections. First, as previously noted, litigating the propriety of classification would effectively destroy the effectiveness of proper classification. Second, a blanket prohibition on communication is bound to limit revelation when it is proper because of the undue risk a person would be compelled to take to determine if classification was improper. (The Congressional history [26] concerning restrictions on revealing government information reflects a continuing concern with the latter danger and there appears no factual basis to expand the carefully limited scope of 50 U.S.C. § 783(b)).

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cution under this section that the information was improperly classified or that is was publicly available at the time of the alleged offense.

An alternative would limit coverage to communication by a public servant "in violation of regulations to which he was subject" but, like the above quoted provisions, would not limit the prohibited class of recipients.

Still another approach considered would grade the offense on the basis of the classification category, *i.e.*, the highest penalty for "top secret," *etc.* This was rejected as impractical and as providing no standard other than executive judgment because classification categories and standards are established by Executive Order without statutory standards. *See* Executive Order No. 10501, "Safeguarding Official Information", reproduced following 50 U.S.C.A. § 401 (1970 Supp.), which replaced Executive Order No. 10290, "Regulations Establishing Minimum Standards for the Classification, Transmission and Handling of Official Information", reproduced following 50 U.S.C.A. § 401.

[26] In particular, *see* the debates concerning 18 U.S.C. § 952 (diplomatic codes). Cong. Rec. 73d Cong., 1st Sess., pp. 3125–3140, 5333–5334 (1933). *See also*, S. Rep. No. 111, 81st Cong. 2d Sess., on 18 U.S.C. § 798 (classified information concerning codes), particularly instructive on the limits of current law and congressional concern and assurances:

> The purpose of the bill [now 18 U.S.C. § 798] is well summarized in the quotation from the Joint Congressional Committee for the Investigation of the Attack on Pearl Harbor, which recommended, on page 253 of the report, that—
>
> ". . . effective steps be taken to insure that statutory or other restrictions do not operate to the benefit of an enemy or other forces inimical to the Nation's security and to the handicap of our own intelligence agencies. With this in mind, the Congress should give serious study to, among other things, . . . legislation fully protecting the security of classified matter."
>
> This bill is an attempt to provide just such legislation for only a small category of classified matter, a category which is both vital and vulnerable to an almost unique degree.
>
> Earlier versions of this same bill (S. 805, 79th Cong.; S. 1019, 80th Cong.; and S. 2680, 80th Cong.) would have penalized the revelation or publication, not only of direct information about United States codes and ciphers themselves but of information transmitted in United States codes and ciphers. This provision is not included in the present version. Under the bill as now drafted there is no penalty for publishing the contents of United States Government communications (except, of course, those which reveal information in the categories directly protected by the bill itself). Even the texts of coded Government messages can be published without penalty as far as this bill is concerned, whether released for such publication by due authority of a Government department or passed out without authority or against orders by personnel of a department. In the latter case, of course, the Government personnel involved might be subject to punishment by administrative action but not, it is noted, under the provisions of this bill.

In addition, the report indicates that classification must be proper for an offense under 18 U.S.C. § 798:

> The bill specifies that the classification must be *in fact* in the interests of national security. (Emphasis added.)

7. *Prohibited Recipients Obtaining Information; Proposed Section 1116.*—Draft section 1116 prohibits foreign agents and members of certain communist organizations from seeking to induce the offenses of mishandling classified information (proposed section 1115) and mishandling information relating to national security (proposed section 1114). Coverage of solicited violations of proposed section 1114, extends 50 U.S.C. § 783(d) to information which is not classified, thus changing present law. Retaining the offense in this expanded form insures that the prohibited recipients and solicitors are subject to felony penalties.

8. *Wartime Censorship of Communications; Proposed Section 1117.*—This provision deals with violations of wartime regulations restricting communication with the enemy or imposing censorship. The language is essentially the same as 50 U.S.C. App. §§ 3(c) and (d), current provisions in the Trading With the Enemy Act.[27] When the violation of the regulation is accompanied by the requisite culpability, it is a Class C felony. Otherwise it is subject to the proposed regulatory offense provision of the draft (section 1006). The grading is lower than the 10 year penalties available for all offenses but one, under the current Trading With the Enemy Act.[28] These offenses are not so serious as to require treatment equal with espionage, graded in the draft as a Class A felony; in the absence of proof of hostile intent they serve mainly as prophylactic measures. Inclusion of this provision would require excision from the Trading With the Enemy Act of the criminal provisions presently applicable to subsections (c) and (d) of 50 U.S.C. App. § 3 (reserving, however, the provisions authorizing issuance of regulations).

9. *Disposition of Prophylactic Offenses in Title 18, Chapter 37 (Espionage and Censorship).*[29]—18 U.S.C. §§ 795–797 authorize imprisonment of 1 year or a $1000 fine or both, for photographing and sketching defense installations in violation of regulations (section 795), permitting the use of aircraft for such purpose (section 796), or disseminating such items in violations of such regulations (section 797); 18 U.S.C. § 799 authorizes the same penalties for violating NASA regulations for the "protection or security" of NASA property. Essentially, these provisions are prophylactic in nature; only 18 U.S.C. § 799 contains any culpability element ("willfully") and none requires culpability or a showing of harm relating to national security; all involve violation of regulations. 18 U.S.C. §§ 795–797 expressly authorize otherwise proscribed conduct, if there is compliance with censorship regulations. It is recommended that these provisions be relocated in other titles: 18 U.S.C. §§ 795–797 in

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[27] The draft expands the limited prohibitions in present 50 U.S.C. App. § 3(c) on transmitting tangible items to the enemy other than in the regular course of the mail, and broadly proscribes any communication with the enemy which violates a regulation.

[28] The exception is 50 U.S.C. App. § 19, which authorizes a $500 fine or 1 year's imprisonment, or both, for violation of foreign language newspaper regulations. *See* the Comment on Offenses Affecting Foreign Relations, *infra*, for additional treatment of the Trading With the Enemy Act.

[29] 18 U.S.C. § 792, harboring or concealing spies, is covered by proposed section 1118 (harboring or concealing national security offenders), discussed *infra*.

Title 50 (War and National Defense)[30], and 18 U.S.C. § 799 in Title 42, chapter 26, which contains the basic provisions regulating the National Space Program. This disposition is in accord with the general plan of the draft to locate nonfelony regulatory provisions in the titles containing the basic regulatory scheme governing the subject matter.[31] It should be noted that violations of these provisions with the culpability proscribed in the draft provisions on espionage and related matters (sections 1113–1117) constitute completed or attempted felonies.

APPENDIX

EXCERPTS FROM

Gorin v. *United States*

AND

United States v. *Heine*

Gorin v. *United States*, 312 U.S. 19, 30–31 (1941):

An examination of the instructions convinces us that no injustice was done petitioners by their content. Weighed by the test previously outlined of relation to the military establishments, they are favorable to petitioners' contentions. A few excerpts will make this clear:

"You are instructed that the term 'national defense' includes all matters directly and reasonably connected with the defense of our nation against its enemies. . . . As you will note, the statute specifically mentions the places and things connected with or comprising the first line of defense when it mentions vessels, aircraft, works of defense, fort or battery and torpedo stations. You will note, also, that the statute specifically mentions by name certain other places or things relating to what we may call the secondary line of national defense. Thus some at least of the storage of reserves of men and materials is ordinarily done at naval stations, submarine bases, coaling stations, dock yards, arsenals and camps; all of which are specifically designated in the statute. . . . You are instructed in the first place that for purposes of prosecution under these statutes, the information, documents, plans, maps, etc., connected with these places or things must directly relate to the efficiency and effectiveness of the operation of said places or things as instruments for defending our nation. . . . You are instructed that in the second place the information, documents or notes must relate to those angles or phases of the instrumentality, place or thing which relates to the defense of our nation; thus if a place or

[30] Prior to the 1948 revision of Title 18, 18 U.S.C. §§ 795–797 constituted chapter 4A of Title 50 (U.S.C. §§ 45–45c, repealed June 25, 1948, c. 645, § 21, 62 Stat. 862).

[31] Note that similar provisions concerning photographing and sketching Atomic Energy Commission installations are located in Title 42 (42 U.S.C. § 2278b). In addition, Title 42 also contains provisions similar to 18 U.S.C. § 799 (violation of NASA Regulations), involving protection of the Atomic Energy Program. *See, e.g.*, 42 U.S.C. §§ 2273, 2278a.

thing has one use in peacetime and another use in wartime, you are to distinguish between information relating to the one or the other use. . . .

"The information, document or note might also relate to the possession of such information by another nation and as such might also come within the possible scope of this statute. . . . For from the standpoint of military or naval strategy it might not only be dangerous to us for a foreign power to know our weaknesses and our limitations, but it might also be dangerous to us when such a foreign power knows that we know that they know of our limitations.

"You are, then, to remember that the information, documents or notes, which are alleged to have been connected with the national defense, may relate or pertain to the usefulness, efficiency or availability of any of the above places, instrumentalities or things for the defense of the United States of America. The connection must not be a strained one nor an arbitrary one. The relationship must be reasonable and direct."

Petitioners' objection, however, is that after having given these instructions, the court instead of determining whether the reports were or were not connected with national defense, left this question to the jury in these words:

"Whether or not the information, obtained by any defendant in this case, concerned, regarded or was connected with the national defense is a question of fact solely for the determination of this jury, under these instructions."

United States v. *Heine*, 151 F.2d 813, 816–817 (2d Cir. 1945):

A less impossible interpretation would be to confine the clause to information about things adapted only for the national defense, and things of ambiguous use which have been already collected, or prepared, for the supply of the armed services. The first would include airplanes, cannon, small arms and munitions of war, warships, forts, and the like: the second, coal, food, clothing or other supplies accumulated for the army and navy. In that interpretation the clause would cover those military planes, though made by private companies, which Heine's reports included. Even so, there might be doubt whether the judge's charge to the jury should not have distinguished between military and commercial planes; but we need not consider that question because we think that it was lawful for him to include information about both kinds of planes. As declared in *Gorin* v. *United States*, 312 U.S. 19, 28, 61 S.Ct. 429, 85 L.Ed. 488, and as the judge himself charged, it is obviously lawful to transmit any information about weapons and munitions of war which the services had themselves made public; and if that be true, we can see no warrant for making a distinction between such information, and information which the services have never thought it necessary to withhold at all. There can, for example, be no rational difference between information about a factory which is turning out bombers, and to which the army allows access to all comers, and information about the same bombers, contained in an official report, or procured by a magazine through interviews with officers. The services must be trusted to determine what information may be broadcast without prejudice to the "national defense," and their consent to its dissemination is as much evidenced

by what they do not seek to suppress, as by what they utter. Certainly it cannot be unlawful to spread such information within the United States; and, if so, it would be to the last degree fatuous to forbid its transmission to the citizens of a friendly foreign power. "Information relating to the national defense," whatever else it means, cannot therefore include that kind of information, and so far as Heine's reports contained it, they were not within the section.

There is independently reason to suppose that this was the meaning which the House at least had in mind when the bill was before it during the First War—1917. It is true that the debates on the floor of both Houses do not tell much, but at the hearings before the Judiciary Committee a number of the witnesses expressed concern at the possible suppression of information as the bill read even before its scope had been enlarged by the amendment. Possibly it was to allay these fears that the Committee, in reporting to the House, used the following words in connection with § 4 as it then was: "This section of the bill has been carefully and patiently considered by the Committee. The Committee realizes that the section as recommended gives the President broad power, but it must be admitted by all patriotic persons anxious for the success of our armies in times like these through which we are now going, it is important that the Commander-in-Chief shall have authority to prevent the publication of national defense secrets which would be useful to the enemy, and, therefore, harmful to the United States." Section 4, about which this language was used, gave the President power to declare a national emergency, and to "prohibit the publication or communication of . . . any information relating to the national defense which in his judgment is of such a character that it is, or might be, useful to the enemy." It is most unlikely that the words in § 4 had a meaning different from the same words then in § 2 of the bill, and now in § 32 of Title 50. At least the Judiciary Committee of the House supposed that the act was directed at "secrets." It is not necessary for us to go so far; and in any event "secrets" is an equivocal word whose definition might prove treacherous. It is enough in the case at bar to hold, as we do, that whatever it was lawful to broadcast throughout the country it was lawful to send abroad; and that it was lawful to prepare and publish domestically all that Heine put in his reports. We do not forget that there was evidence that in his letters and in his talks he misled his correspondents as to his motive in asking for information; but that is not relevant to the second count. Whatever the wrong done to his correspondents, that motive did not make the spread of information criminal, which it would not have been criminal to spread, if he had got it fairly. Nor did it make a difference that Heine did not transmit to the Volkswagenwerke the information as he got it; but combed it out, arranged it and compressed it into convenient form. The section is aimed at the substance of the proscribed information, not at the act of making it more readily available for use.

Gorin v. United States, supra (312 U.S. 1961, S.Ct. 429, 85 L.Ed. 488), contains nothing to the contrary of what we are holding. It is true that the court (312 U.S. 28, 61 S.Ct. 434) there accepted the following definition of the phrase, "relating to the national defense" taken from the prosecution's brief: "a generic concept of broad connotations, referring to the military and naval establishments and the

related activities of national preparedness." The words, "related activities of national preparedness," do indeed create a penumbra of some uncertainty; but it cannot comprise such information as is here in question, as appears from what immediately preceded the language we have quoted: "Where there is no occasion for secrecy, as with reports relating to national defense, published by authority of Congress or the military departments, there can, of course, in all likelihood be no reasonable intent to give an advantage to a foreign government." Obviously this could not mean that it may not be to the advantage of a foreign government to have possession of such information; it can only mean that, when the information has once been made public, and has thus become available in one way or another to any foreign government, the "advantage" intended by the section cannot reside in facilitating its use by condensing and arranging it.

As to the first count, in spite of the absence of any direct evidence showing the connection of the Volkswagenwerke with the Reich, there was ample in Heine's history and conduct to support a verdict based upon the finding that he was acting as an agent for the Reich, and the jury was of course not bound to accept his own explanation. The Volkswagenwerke had never made airplanes; and, so far as appears, they did not propose to make military planes anyway. Why should they wish accounts of the industry in this country as complete as possible? What good would it do them to learn the amount of our production, all of which at the time was for our own use? Moreover, although it is true that in the summer of 1940, war was not imminent, everyone knew that it was not impossible. France had fallen; Russia was apparently neutral, and had overrun part of Poland in conjunction with Germany; Britain stood alone, with every prospect of herself going down. We were already embarked upon our belated preparation, and that could be directed only against the Reich. If a jury was not permitted in such a setting to infer that the collection and transmission of such information by such means as Heine employed, was for the Reich, and not for the Volkswagenwerke, there is an end to circumstantial proof. Nobody but a simpleton could fail to detect the hall-marks of the principal in whose interest the whole web of chicane and evasion had been woven.

Conviction on the first count affirmed.

Conviction on the second count reversed.

Harboring or Concealing National Security Offenders: Section 1118

1. *Proposed Section 1118: Harboring or Concealing National Security Offenders; Before-the-Fact and After-the-Fact Liability.*—Proposed section 1118 proscribes knowingly harboring and concealing a person who is about to commit or who has committed treason, sabotage, espionage or murder of the President or Vice President. Present law proscribes harboring or concealing a person one knows "or has reasonable ground to believe or suspect, has committed, *or is about to commit*" espionage (emphasis added).[1] Similar proscriptions apply to harboring or concealing a person who is interfering or is about to in-

[1] 18 U.S.C. § 792.